IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 8, 2005 Session

STATE OF TENNESSEE v. GREGORY T. HARWOOD

Interlocutory Appeal from the Criminal Court for Davidson County
No. 2003-B-843 Steve Dozier, Judge

No. M2004-01811-CCA-R9-CO - Filed September 7, 2005

This interlocutory appeal presents a challenge to the constitutionality of Tennessee's child exploitation statute. Upon thorough review, we conclude that: (1) the term "knowingly possess" provides fair warning of the conduct prohibited by the statute and does not allow for the prosecution of individuals who innocently possess child pornography; (2) the term "material," as used in the statute, does not encompass protected speech such as virtual pornography or images that only "appear" to depict minors; and (3) the permissive inference contained in subsection (b) of the subject statute neither broadens the scope of the statute nor shifts the burden of proof but, rather, allows the jury to deem circumstantial evidence sufficient to meet the State's burden of proof beyond a reasonable doubt. For these reasons, we hold that Tennessee Code Annotated section 39-17-1003 is constitutional on its face and affirm the trial court's denial of the motion to dismiss.

Tenn. R. App. P. 9; Judgment of the Criminal Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON and NORMA MCGEE OGLE, JJ., joined.

Jodie A. Bell and Wendy S. Tucker, Nashville, Tennessee, for the appellant, Gregory T. Harwood.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Victor S. (Torry) Johnson, III, District Attorney General; and Brian K. Holmgren, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The defendant, Gregory T. Harwood, was charged with four counts of sexual exploitation of a minor (a Class E felony). Pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, he was granted application for interlocutory appeal to challenge the trial court's denial of his motion to dismiss, in which he asserted that Tennessee Code Annotated section 39-17-1003 is

unconstitutional on its face. Specifically, he asserts that: (1) the term "possess" is unconstitutionally vague and overbroad; (2) the term "material" is unconstitutionally overbroad; and (3) the permissive inference found in subsection (b) of the statute is unconstitutionally overbroad and violates due process. Upon review, we hold that Tennessee Code Annotated section 39-17-1003 is not unconstitutional on its face.

We note at the outset that we are aware that a panel of this court recently held subsection (b) of the child exploitation statute unconstitutional and, in turn, elided it. State v. Richard Allen Butler, No. E2004-00359-CCA-R9-CD, 2005 Tenn. Crim. App. LEXIS 302 (Tenn. Crim. App., at Knoxville, Mar. 30, 2005), app. denied (Tenn. Aug. 22, 2005). However, upon our research and analysis, we reach a conclusion contrary to that expressed in Butler.

The case before us presents no specific facts to guide us; therefore, we may only find the statute unconstitutional if it is facially invalid. A statute may be facially invalid on First Amendment grounds if it proscribes a substantial amount of "protected expression." Ashcroft v. Free Speech Coalition, 535 U.S. 234, 246, 122 S. Ct. 1389, 1399 (2002). In that vein, we note that the Supreme Court has held that facial invalidity of a statute is inappropriate where: (1) there are a substantial number of situations to which the legislation might be validly applied; (2) the legislation covers a range of easily identifiable and constitutionally proscribable conduct; or (3) where the legislation is susceptible to a narrowing construction by the courts. Parker v. Levy, 417 U.S. 733, 760, 94 S. Ct. 2547, 2563 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 613, 93 S. Ct. 2908, 2916 (1973) (citations omitted). Therefore, our opinion reflects the caution that must be employed when addressing a facial challenge to a statute.

The subject statute states as follows:

> Sexual exploitation of a minor
> (a) It is unlawful for any person to knowingly possess material that includes a minor engaged in:
> (1) Sexual activity; or
> (2) Simulated sexual activity that is patently offensive.
> (b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor.
> (c) A violation of this section is a Class E felony.

Analysis

I. "Possess"

The defendant initially contends that the term "possess," as employed in the pertinent statute, is unconstitutionally vague and overbroad because it is not statutorily defined. In support, the defendant states that one "who receives an unsolicited image *via* email or through a pop-up advertisement" could be subject to prosecution under the child exploitation statute. However, upon review, we conclude that the term possess is neither vague nor overbroad.

Taking the contentions in order, a statute is unconstitutionally vague "if its prohibitions are not clearly defined." Davis-Kidd Booksellers, Inc. v McWherter, 866 S.W.2d 520, 531 (Tenn. 1993) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298, 33 L. Ed. 2d 222 (1972)). Therefore, in order to satisfy the dictates of due process, a statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Id. at 532 (quoting Kolender v. Lawson, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858, 75 L. Ed. 2d 903 (1983) (citations omitted)).

In the present case, the defendant argues that the term "possess" leaves too much to the discretion of law enforcement and the courts and allows the prosecution of innocent individuals who electronically "stumble" upon child pornography. In his brief, the defendant isolates the term "possess" to support the proposition that anyone who unwittingly receives material prohibited by the statute could be subject to prosecution. However, the terms of a statute should not be read in isolation but within their context, so as to affect the true intent of the statute. In this case, the term possess, although not defined, is qualified by the term immediately preceding it: knowingly. "'Knowing' refers to a person who acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist. A person acts knowingly with respect to a result of the person's conduct when the person is aware that the conduct is reasonably certain to cause the result." Tenn. Code Ann. § 39-11-106(a)(20) (2003); see also 7 Tenn. Pattern Jury Instr. – Crim. T.P.I. – Crim. 2.09, at 24 (2004). Furthermore, "possess" is defined in Black's Law Dictionary as, "To have in one's actual control; to have possession of." Black's Law Dictionary 1183 (7th ed. 1999).

Bearing these definitions in mind, it is apparent that accidental possession of the prohibited materials is not enough to satisfy the State's burden of knowing possession. Indeed, one who receives an unsolicited email or advertisement that contains child pornography has not overtly acted at all, much less knowingly. Similarly, one who accidentally opens a disguised email or inadvertently visits a web page containing child pornography cannot be said to have acted with awareness that he or she is taking knowing possession of prohibited material. Although the defendant claims that citizens could "inadvertently, but knowingly 'possess' prohibited images on their computers," this argument, in our view, is oxymoronic and attempts to expand the scope of the statute beyond that which is established by the plain meaning of its terms.

The defendant correctly points out that technological advancements have allowed investigators to see a virtual roadmap of every step an individual takes on their computer, including any images, obtained accidentally or otherwise, containing prohibited materials. However, the same technology that could produce substantial circumstantial evidence of knowing possession, such as repeated visits to a website plainly labeled child pornography or email requests for pornographic images of a child, could be used to exonerate an innocent possessor. Investigators could certainly determine that email messages or "pop-up advertisements" were unsolicited, disguised, immediately deleted, or even left unopened; ultimately, those types of possessions are not knowing. In sum, when unsolicited material is transferred surreptitiously, the mere presence of that material on the computer hard drive is insufficient to prove knowing possession.

As such, we conclude that the term "knowingly possess" is not unconstitutionally vague, in that it provides fair warning of the conduct prohibited by the statute and prevents "arbitrary and discriminatory enforcement." See Davis-Kidd Booksellers, Inc., 866 S.W.2d at 531-32. The term knowing, which qualifies the term "possess," requires a degree of awareness regarding the nature of the unlawful possession or the contents of the material being possessed. Therefore, the requirement of knowing possession eliminates the possibility of an unsolicited or accidental possession being prosecuted under this statute.

The defendant also alleges that the term "possess" is unconstitutionally overbroad. Initially, we note that the Supreme Court has opined that declaring a statute facially overbroad "is, manifestly, strong medicine" and that such a declaration should be employed "sparingly and only as a last resort." Broadrick, 413 U.S. at 613. The Court has further held that "when considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." Erznoznik v. Jacksonville, 422 U.S. 205, 216, 95 S. Ct. 2268, 2276 (1975).

> To maintain an overbreadth challenge, [the defendant] must first show that the statute challenged involves constitutionally protected conduct. If the statute reaches a substantial amount of constitutionally protected conduct, a defendant must then "demonstrate from the text of the law and actual fact that there are a substantial number of instances where the law cannot be applied constitutionally."

State v. Burkhart, 58 S.W.3d 694, 700 (Tenn. 2001) (citations omitted).

For the same reasons we rejected the defendant's vagueness claim, we likewise reject the facial overbreadth claim. The term "knowingly possess," as used in the statute, sufficiently defines and limits the proscribed conduct to that which is constitutionally unprotected. As we have previously discussed, the defendant's examples of innocent or accidental possession do not come within the purview of the statute because they do not meet the standard of a knowing possession. For this reason, the challenged statute also does not encompass a substantial amount of constitutionally protected conduct; therefore, the defendant's overbreadth challenge must fail.

II. "Material"

Next, the defendant contends that the term "material" is overbroad. In support, he contends that the statute in question is analogous to the Child Pornography Prevention Act of 1996 (hereinafter CPPA), in that it chills a substantial amount of protected speech that is neither obscene under Miller v. California, 413 U.S. 15, 93 S. Ct. 2607 (1973), nor "intrinsically related" to the sexual abuse of children under New York v. Ferber, 458 U.S. 747, 102 S. Ct. 3348 (1982). For this reason, the defendant contends that the statute reaches a substantial amount of protected speech and should be stricken as facially overbroad. See Burkhart, 58 S.W.3d at 700.

Section 2256(8)(B) of the CPPA prohibited "'any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture' that 'is, or appears to be, of a minor engaging in sexually explicit conduct.'" Free Speech Coalition, 535 U.S. at 241, 122 S. Ct. at 1397. Consequently, in Free Speech Coalition, the Supreme Court declared section 2256(8)(B)

unconstitutionally overbroad because it extended to protected speech that was neither obscene nor sufficiently related to the abuse of an actual minor. Id. at 246, 250.

In first analyzing section 2256(8)(B) against the backdrop of Miller, the Court recognized that not every image containing an actor who appeared to be a minor engaging in a sexually explicit activity violated the Miller obscenity test. Id. at 246. As examples, the Court noted several acclaimed films featuring youthful-looking adult actors that could be banned under the CPPA for depicting a theme "within the wide sweep of the statute's prohibitions," without regard to Miller. Id. at 247-48.

Likewise, the Court rejected the Government's argument that the speech proscribed by the CPPA was "virtually indistinguishable from child pornography," which Ferber concluded was *per se* unprotected without regard to Miller. Id. at 249 (citing Ferber, 458 U.S. at 761). Ferber held that the production, distribution, and sale of child pornography were "intrinsically related" to child sexual abuse in two ways: (1) as a permanent record of the child's abuse, whose continued circulation would harm the child participant; and (2) because the trafficking of child pornography was an economic incentive of its production, the State had an interest in closing the network of distribution. Id. (citing Ferber, 458 U.S. at 759).

In distinguishing Ferber from the CPPA, the Court noted that section 2256(8)(B) proscribed speech that did not record criminal acts and created "no victims by its production." Id. at 250. Further, the Court noted that the CPPA could not be said to comport with Ferber because it prohibited virtual images, an alternative that Ferber relied upon as a permissible form of expression for valuable content that would otherwise be considered child pornography. Id. at 251 (citing Ferber, 458 U.S. at 761, 763).

In the present case, the defendant shapes his argument so as to track the analysis in Free Speech Coalition. In so doing, he relies on what is, in his view, a substantial similarity between section 2256(8)(B) of the CPPA and the Tennessee child exploitation statute. Specifically, he contends that the two statutes are analogous in that they prohibit both virtual images and material containing actors who merely "appear[] to be minors." However, we conclude that the two statutes can be sharply distinguished.

Initially, we note that the aims of the two provisions are substantially different. Excerpts from the legislative history of the CPPA reveal that the purpose of its enactment was to expand the traditional definition of child pornography to the realm of virtual images and material depicting youthful-looking adults:

> Current Federal law, U.S.C. title 18, sec. 2251 et seq., prohibits the sexual exploitation of children for the purpose of producing any visual depiction of a minor engaging in sexually explicit conduct, and the distribution, possession, receipt, reproduction, sale or transportation of material depicting children engaging in sexually explicit conduct. The term "sexually explicit conduct" is defined at 18 U.S.C. 2256(2). These statutes apply, however, only to visual depictions of children engaging in sexually explicit conduct whose production involved the use of an actual

> minor engaging in such conduct. Under present law, the Government must prove that every piece of child pornography is of a real minor being sexually exploited. Regrettably, computers and computer imaging technology unheard of only a few short years ago have opened the door to an entirely new means of producing child pornography.
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> . . . .
>
> S. 1237 will close this computer-generated loophole in Federal child exploitation laws and give our law enforcement authorities the tools they need to protect our children by stemming the increasing flow of high-tech child pornography. It would establish, for the first time, a Federal statutory definition of child pornography. Any visual depiction of sexually explicit conduct, however produced, would be classified as "child pornography" if: (a) its production involved the use of a minor engaging in sexually explicit conduct, or; (b) it depicts, or appears to depict, a minor engaging in sexually explicit conduct, or; (c) it is promoted or advertised as depicting a minor engaging in sexually explicit conduct. Under S. 1237, computer-generated child pornographic images, which in real life are increasingly indistinguishable in the eyes of viewers from unretouched photographs of actual children engaging in sexually explicit conduct, and can result in many of the same types of harm to children and society, would now also be indistinguishable in the eyes of the law from pornographic material produced using actual children.
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> . . . .
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> . . . There is no difference between the content of photographs or films depicting such conduct produced using actual children and the content of the computer-generated depictions made contraband under this bill.

S. Rep. No. 104-358, pt. IV (A), (B) (1996). Therefore, the legislative history of the CPPA demonstrates that it expanded the traditional definition of child pornography for the purpose of relieving the prosecution of the burden of proving actual minority or even that the image depicted a real person.

Turning to the case at hand, we initially note that the instant statute was not directed at what Free Speech Coalition ultimately determined was protected speech but is akin to Ferber in that it proscribes only images resulting from the sexual abuse of actual minors. Although the defendant asserts that our definition of "material" goes further, the plain language of the statute does not support this argument. Indeed, Tennessee Code Annotated section 39-17-1003 is limited to "material that includes a minor engaged in: (1) sexual activity; or (2) simulated sexual activity that is patently offensive," and does not include, within its scope, virtual images or youthful-looking adult actors, as did the CPPA.

We recognize that the defendant's argument is underpinned by the theory that the permissive inference contained in subsection (b) of the statute expands its scope to include the types of protected speech addressed in Free Speech Coalition. However, as is discussed in greater depth *infra*, the permissive inference does not function to broaden the purview of the statute or shift the burden of proof but is an evidentiary device which allows the factfinder to deem circumstantial evidence sufficient to meet the State's burden of proof beyond a reasonable doubt. In our view, the two

subsections should be read as they were written, separate and distinct from one another. While the former defines the parameters of the provision, the latter provides an alternate avenue by which the State may meet its burden of proof.

"In interpreting statutes the legislative intent must be determined from the plain language it contains, read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning." National Gas Distributors, Inc. v. State, 804 S.W.2d 66, 67 (Tenn. 1991) (citing Metro. Gov't of Nashville and Davidson County v. Motel Systems, Inc., 525 S.W.2d 840, 841 (Tenn. 1975)) (emphasis added). We conclude that reading the two subsections as if they were one substitutes the intended construction with one that is forced and that expands the scope of the statute beyond what the Legislature intended. A plain reading of subsection (a) leads us to the conclusion that "material," as it is used in our statute, does not chill a substantial amount of protected speech and, therefore, is not overbroad.

III. Inference of Minority

Finally, the defendant asserts that the inference of minority, found in subsection (b) of the statute in question, is overbroad and violates due process by shifting the burden of proof from the prosecution to the defendant. In support of his arguments, the defendant draws an analogy between section 2256(8)(D) of the CPPA, found to be unconstitutionally overbroad in Free Speech Coalition, and the Tennessee statute. However, we reiterate that distinctions between the CPPA and the Tennessee statute exist, which are dispositive of both issues.

> The subsection at issue states:
> (b) In a prosecution under this section, the trier of fact may infer that a participant is a minor if the material through its title, text, visual representation or otherwise represents or depicts the participant as a minor.

Tenn. Code Ann. § 39-17-1003 (2003). Section 2256(8)(D) of the CPPA included in its definition of child pornography, "any sexually explicit image that was 'advertised, promoted, presented, described, or distributed in such a manner that conveys the impression' it depicts 'a minor engaging in sexually explicit conduct.'" Free Speech Coalition, 535 U.S. at 242. As we have previously noted, this expanded definition relieved the prosecution of being required to prove that the material depicted an actual minor. Although the Supreme Court never squarely addressed the due process implications of the Act, it held that any affirmative defense that may be asserted by a defendant would be "incomplete and insufficient," because a defendant could "be convicted in some instances where they can prove children were not exploited in the production." Id. at 256. Therefore, because the section was constitutionally overbroad, no affirmative defense could save it. Id.

In contrast, although the Tennessee statute contains a permissive inference of minority based upon the context of the image, it neither renders the statute facially overbroad nor makes it violative of due process. As we have previously noted, the CPPA was invalidated because it contained within its scope a substantial amount of protected speech, which was not obscene under Miller or related to the abuse of an actual minor under Ferber. However, the subsection before us does not expand the definition of child pornography to protected forms of speech, as was the case with the CPPA, but

rather serves as an evidentiary device that is distinct from subsection (a), which defines the scope of the statute.

> The Supreme Court has previously opined that:
> Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime – that is, an "ultimate" or "elemental" fact – from the existence of one or more "evidentiary" or "basic" facts.

County Court of Ulster County v. Allen, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224 (1979) (citations omitted). Furthermore, in order for a permissive inference to pass constitutional muster, the connection between the proven and presumed facts must be rational on its face or rational based on the facts of the given case. See id. at 165.

In light of the most recent findings, we conclude that the requisite connection is established. Following the decision in Free Speech Coalition, Congress enacted the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003, replacing the constitutionally infirm portions of CPPA. The PROTECT Act demonstrated a marked change from the CPPA, both in Congress' opinion as to the existence and volume of virtual child pornography and its philosophy on the prosecution of such images. While the CPPA was premised on the notion that virtual images could be produced easily and with minimal expense, the PROTECT Act came to a contrary conclusion:

> (11) Leading experts agree that, to the extent that the technology exists to computer generate realistic images of child pornography, the cost in terms of time, money, and expertise is - and for the foreseeable future will remain - prohibitively expensive. As a result, for the foreseeable future, it will be more cost-effective to produce child pornography using real children. It will not, however, be difficult or expensive to use readily available technology to disguise those depictions of real children to make them unidentifiable or to make them appear computer-generated.

H.R. Rep. No. 108-66, at 501(11) (2003) (emphasis added). This conclusion is in accord with, and perhaps a result of, Justice Kennedy's reaction to the government's argument that virtual images comprised a substantial part of the child pornography market:

> Virtual images, the Government contends, are indistinguishable from real ones; they are part of the same market and are often exchanged. In this way, it is said, virtual images promote the trafficking in works produced through the exploitation of real children. The hypothesis is somewhat implausible. If virtual images were identical to illegal child pornography, the illegal images would be driven from the market by the indistinguishable substitutes. Few pornographers would risk prosecution by abusing real children if fictional, computerized images would suffice.

Free Speech Coalition, 535 U.S. at 254. Therefore, absent any evidence that virtual pornography would be mistaken for pornography depicting real children, the correlation between proven fact and the inference grows stronger. Until there is some indication that virtual child pornography is being

produced, we conclude that the connection between the appearance or depiction of an individual as a minor and the permissive presumption of minority is substantial and certainly withstands constitutional scrutiny.

Moreover, even absent the inference, it is well-settled that "circumstantial evidence alone may be sufficient to support a conviction." State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993) (citing State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988)). Furthermore, it is the province of the jury to determine the weight given to circumstantial evidence, "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence." Marable v State, 313 S.W.2d 451, 457 (Tenn. 1958); see also Gregory, 862 S.W.2d at 577; State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985). The inference found in subsection (b) simply listed examples of the circumstantial evidence that may properly be considered by the factfinder in determining whether or not the actor was a minor.

Furthermore, as a practical matter, it is a formidable task for the State to prove, by direct evidence, the age of every subject in all prosecutions under this section. For example, if the material is sold or transferred via the internet, the State may not even be able to determine the name of the depicted individual, where the individual lives, or his or her age at the time the material was produced. See State v. Michael J. Morris, No. 04CA0036, 2005 Ohio App. LEXIS 621 (Ohio Ct. App. Feb. 16, 2005). Therefore, this subsection makes clear that the State may meet its evidentiary burden by the presentation of circumstantial evidence, which in many cases may be the only proof available to the prosecution. Further proof of the evidentiary basis of subsection (b) is found in its recent amendment:

> In a prosecution under this section, the trier of fact may consider the title, text, visual representation, Internet history, physical development of the person depicted, expert medical testimony, expert computer forensic testimony, and any other relevant evidence in determining whether a person knowingly possessed the material or in determining whether the material or image otherwise represents or depicts that a participant is a minor.

2005 Tenn. Pub. Acts ch. 496. By this amendment, the Legislature is clearly indicating its desire to include alternative methods of proving child exploitation.

For these reasons, we distinguish the Tennessee child exploitation statute from the CPPA and conclude that the permissive inference does not expand the scope of the statute to a substantial amount of protected speech, so as to render it facially overbroad. Rather, this permissive inference states explicitly what is well-settled: that the State's burden to prove actual minority may be met by circumstantial evidence.

Finally, the defendant alleges that the inference permitted by subsection (b) "wholly relieve[s]" the State of its burden to prove the age of the actor beyond a reasonable doubt, thereby violating the dictates of due process. We disagree. As was noted by the Supreme Court two decades ago, "[a] permissive inference does not relieve the State of its burden of persuasion because it still

requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved." Francis v. Franklin, 471 U.S. 307, 314, 105 S. Ct. 1965, 1971 (1985).

Our courts have consistently held that, while presumptions (with the exception of the presumption of innocence) should be avoided in criminal cases, "juries may be instructed that a permissible inference may or may not be drawn of an elemental fact from proof by the State of a basic fact, but that such an inference places no burden of proof of any kind upon [the] defendant." State v. Sensing, 843 S.W.2d 412, 417 (Tenn. 1992) (quoting State v. Martin, 702 S.W.2d 560 (Tenn. 1985) and citing State v. Bolin, 678 S.W.2d 40, 44-45 (Tenn. 1984)).

In conclusion, we reiterate that the Tennessee statute neither included in its provisions the protected speech that was proscribed by the CPPA nor was it aimed at such speech. Moreover, the permissive inference of minority does not expand the scope of the statute to include virtual images and youthful-looking actors but merely allows the trier of fact to deem the circumstantial evidence before them sufficient proof that the subject material portrayed an actual minor. This is vastly different from the CPPA, whose scope was far greater and required defendants to, almost without fail, work from a deficiency in an attempt to prove that the speech was not unlawful under the far-reaching bounds of the Act.

Conclusion

Based upon the foregoing, we affirm the trial court's denial of the motion to dismiss.

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JOHN EVERETT WILLIAMS, JUDGE